

**AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT**

Application 10/664,754

Attorney Docket 2002P15652US01 (1009-039)

REMARKS

Applicant respectfully thanks the Examiner for the consideration provided to this application, and respectfully requests reconsideration of this application.

Claim 9 has been amended for at least one reason unrelated to patentability, including at least one of: to explicitly present one or more elements, limitations, phrases, terms and/or words implicit in the claim as originally written when viewed in light of the specification, thereby not narrowing the scope of the claim; to detect infringement more easily; to enlarge the scope of infringement; to cover different kinds of infringement (direct, indirect, contributory, induced, and/or importation, etc.); to expedite the issuance of a claim of particular current licensing interest; to target the claim to a party currently interested in licensing certain embodiments; to enlarge the royalty base of the claim; to cover a particular product or person in the marketplace; and/or to target the claim to a particular industry.

Each of claims 21-25 have been added.

Claims 1-25 are now pending in this application. Each of claims 1, 19, and 20 is in independent form.

I. The Anticipation Rejections

Each of claims 1-12 and 19-20 was rejected as anticipated, and thus unpatentable, under 35 U.S.C. 102(b). In support of the rejection, various portions of U.S. Patent 6,282,455 ("Engdahl") were applied. These rejections are respectfully traversed.

A. Legal Standards

To establish a *prima facie* case of express anticipation, the "invention must have been known to the art in the detail of the claim; that is, all of the elements and limitations of the claim must be shown in a single prior art reference, arranged as in the claim". *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1383, 58 USPQ2d 1286, 1291 (Fed. Cir. 2001); *See also*, MPEP 2131. The single reference must describe the claimed subject matter "with sufficient clarity and detail to establish that the subject matter existed in the prior art and that its existence

AMENDMENT UNDER 37.C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT

Application 10/664,754

Attorney Docket 2002P15652US01 (1009-039)

was recognized by persons of ordinary skill in the field of the invention". *Crown Operations Int'l, LTD v. Solutia Inc.*, 289 F.3d 1367, 1375, 62 USPQ2d 1917, 1921 (Fed. Cir. 2002).

Moreover, the prior art reference must be sufficient to enable one with ordinary skill in the art to practice the claimed invention. *In re Borst*, 345 F.2d 851, 855, 145 USPQ 554, 557 (CCPA 1965), *cert. denied*, 382 U.S. 973 (1966); *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1354, 65 USPQ2d 1385, 1416 (Fed. Cir. 2003) ("A claimed invention cannot be anticipated by a prior art reference if the allegedly anticipatory disclosures cited as prior art are not enabled.")

The USPTO "has the initial duty of supplying the factual basis for its rejection." *In re Warner*, 379 F.2d 1011, 154 USPQ 173, 178 (CCPA 1967).

B. Analysis

Engdahl fails to establish a *prima facie* case of anticipation.

Specifically, each of claims 1, and 19, from one of which each of claims 2-12 ultimately depends, states, *inter alia*, yet no substantial evidence has been presented that the applied portions of Engdahl teach, "responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically **adjusting a position** of said parent node". Claim 20 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of Engdahl teach, "a processor adapted to, responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically **adjust a position of said parent node**".

The present Office Action alleges, at least at Page 3, that this claimed subject matter is taught as:

...responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node ('...is on top of another object...' col. 8, lines 25-26), automatically adjusting a position of said parent node ('...parent node connects to the child node's properties...' col. 8, lines 29-30).

**AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT**

Application 10/664,754

Attorney Docket 2002P15652US01 (1009-039)

Yet the present Office Action fails to provide evidence that the applied portion of Engdahl that states, at col. 8, lines 29-30, "node connects to the child node's properties" teaches "automatically" adjusting a "position of said parent node". Instead, regarding the "properties" referenced in col. 8, lines 29-30, Engdahl allegedly states, at col. 8, lines 30-51 (emphasis added):

[f]or example, the meter tool 68 has an input argument accepting a physical quantity output type that may be a physical quantity reflected in data of a property associated with another object 64. Placement of the meter tool 68 on a particular stationary object 64 **provides a reading of physical quantity I/O data in quantitative form that is part of the properties of the node of the stationary object 64.** An example stationary object would be a terminal block object 109 providing a visual terminal for electrical values and having a voltage property. As a second example, the communications port object 91 may have **communications data as a property readable by the meter tool 68.** The identification of objects that should have their arguments connected is by parent child relationships of the scene graph 56. **All properties of the nodes, representing data associated with the nodes, may be grouped according to data type** so that such linkages may be established automatically. Thus the meter tool methods indicate the type of data they may accept (e.g., voltage, temperature, logic) and when connected to another node as a child may search for relevant data types and automatically connect to these devices by reading the properties associated with the data types.

The "properties" referenced by the applied portion of Engdahl appear to be related to providing a **"reading of physical quantity I/O data in quantitative form", "communications data", or "data associated with the nodes"**. The present Office Action presents no evidence that any "properties" referenced by the applied portions of Engdahl teach, "automatically" adjusting a "position of said parent node".

In response to this previously presented and persuasive argument, the present Office Action merely highlights different portions of col. 8, lines 30-51. The present Office Action

**AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT**

Application 10/664,754

Attorney Docket 2002P15652US01 (1009-039)

appears to allege that somehow (portions highlighted by the present Office Action are extracted as follows for illustrative purposes) “objects” “connected” “by parent child relationships of the scene graph 56”, “properties of the nodes” such as “linkages may be established automatically”, and/or “when connected to another node” “a child may search” “and automatically connect to these devices by reading the properties associated with the data types” teach “automatically” adjusting a “position of said parent node”. Applicant respectfully submits that no evidence is of record that:

- i. merely connecting “objects by “parent child relationships” teaches any adjustment of “a position of a parent node”;
- ii. that “properties of nodes” or “linkages” that may be “established automatically” teaches any adjustment of “a position of a parent node”; or
- iii. that a “child that “may search” and “automatically connect to these devices by reading the properties associated with the data types” teaches any adjustment of “a position of a parent node”.

The present Office Action further alleges at Pages 14-15:

Applicant argues:

[t]he ‘properties’ referenced by the applied portion of Engdahl appear to be related to providing a ‘reading of physical quantity I/O data in quantitative form’, ‘communications data’, or ‘data associated with the nodes’.

In response to Applicant’s argument, it is noted that Claims 1, 19, and 20 all make use of the transitional term ‘comprising’ (which is synonymous with ‘including,’ ‘containing,’ or ‘characterized by,’) which is inclusive or open-ended and does not exclude additional, un-recited elements or method steps. Claims 1, 19, and 20 only require the ‘automatically adjusting’ to be ‘responsive to a detected collision’ of the ‘position of said parent node’. *Engdahl’s* disclosure of types of ‘properties’ being used when ‘automatically adjusting’ in responsive to ‘a detected collision’ is anticipatory regardless additional features being present,

**AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT**

Application 10/664,754

Attorney Docket 2002P15652US01 (1009-039)

Generally each node includes the property of visibility and thus its associated object may become invisible or transparent allowing this nesting of objects in other objects to be properly displayed on the visual display 22 and the display to be simplified when all components to nodes need not be displayed.

(col. 6, lines 40-45)

Applicant respectfully traverses these allegations. No evidence is of record that that a "property of visibility" teaches any adjustment of "a position of a parent node". The discussion of the "transitional term 'comprising'" is inapposite since no evidence has been presented that all of at least the claim limitation regarding "adjusting" "a position of a parent node" "responsive to a detected collision" are taught by the applied portions of Engdahl.

Thus, the present Office Action presents no substantial evidence that the applied portions of Engdahl teach, "responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically **adjusting a position** of said parent node".

For at least this reason, it is respectfully submitted that the rejection of claims 1, 19, and 10 is unsupported by Engdahl and should be withdrawn. Also, the rejection of claims 2-12, each ultimately depending from independent claim, is unsupported by Engdahl and also should be withdrawn.

In addition, the rejection of claim 9 is traversed as moot in view of the present amendments to claim 9. Specifically, claim 9 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of Engdahl teach, "in response to the detected collision, recursively calculating a position of each of the plurality of HMI screen nodes and updating the position of the parent node, based upon each recursive calculation, until no collision is detected."

For at least these reasons, reconsideration and withdrawal of the rejection of claim 9 is respectfully requested.

**AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT**

Application 10/664,754

Attorney Docket 2002P15652US01 (1009-039)

II. The Obviousness Rejections

Each of claims 13-18 was rejected under 35 U.S.C. 103(a) as being obvious, and thus unpatentable, over various combinations of U.S. Patent 6,282,455 ("Engdahl"), U.S. Patent 2004/0021679 ("Chapman"), and/or U.S. Patent 5,911,145 ("Arora"). Each of these rejections is respectfully traversed.

A. Legal Standards

1. *Prima Facie* Criteria for an Obviousness Rejection

In *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), the Supreme Court established factors regarding the factual inquiry required to establish obviousness. The factors include:

1. determining the scope and contents of the prior art;
2. ascertaining differences between the prior art and the claims at issue;
3. resolving the level of ordinary skill in the pertinent art; and
4. considering objective evidence indicating obviousness or nonobviousness.

The Federal Circuit has applied *Graham*'s required factual inquiry in numerous legal precedents that are binding on the USPTO.

It is recognized that most patentable inventions arise from a combination of old elements and often, each element is found in the prior art. *In re Rouffet*, 149 F.3d 1350, 1357 (Fed. Cir. 1998). In *KSR International Co. v. Teleflex Inc.*, 2007 U.S. LEXIS 4745 (2007), the United States Supreme Court clarified that:

1. "[t]he question is not whether the combination was obvious to the patentee but whether the combination was obvious to a person with ordinary skill in the art";
2. "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art";

**AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT**

Application 10/664,754

Attorney Docket 2002P15652US01 (1009-039)

3. it is necessary "to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. To facilitate review, this analysis should be made explicit"; and
4. "[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness" (*quoting In re Kahn*, 441 F. 3d 977, 988 (Fed. Cir. 2006)).

To establish a *prima facie* case of obviousness, certain criteria must be met. Evidence must be provided that indicates that the combination was obvious to a person with ordinary skill in the art. *KSR International Co. v. Teleflex Inc.*, 2007 U.S. LEXIS 4745 (2007); *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). That evidence must include an apparent reason, with a rational underpinning, to combine the known elements in the fashion claimed in the patent at issue. *KSR International Co. v. Teleflex Inc.*, 2007 U.S. LEXIS 4745 (2007). There must be a reasonable expectation of success. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991); MPEP 2143. In addition, the prior art reference (or references when combined) must teach... all the claim limitations. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991); MPEP 2143.

Moreover, the "Patent Office has the initial duty of supplying the factual basis for its rejection." *In re Warner*, 379 F.2d 1011, 154 USPQ 173, 178 (CCPA 1967), cert. denied, 389 U.S. 1057, *reh'g denied*, 390 U.S. 1000 (1968). "It may not... resort to speculation, unfounded assumptions or hindsight reconstruction to supply deficiencies in its factual basis". *Id.*

It is legal error to "substitute[] supposed *per se* rules for the particularized inquiry required by section 103. It necessarily produces erroneous results." *See, In re Ochiai*, 71 F.3d 1565, 1571, 37 USPQ2d 1127, 1132-33 (Fed. Cir. 1998); *In re Wright*, 343 F.2d 761, 769-770, 145 USPQ 182, 190 (CCPA 1965).

"Once the examiner... carries the burden of making out a *prima facie* case of unpatentability, 'the burden of coming forward with evidence or argument shifts to the

**AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT**

Application 10/664,754

Attorney Docket 2002P15652US01 (1009-039)

applicant.” *In re Alton*, 76 F.3d 1168, 37 USPQ2d 1578 (Fed. Cir. 1996) (quoting *In re Oetiker*, 977 F.2d at 1445, 24 USPQ2d at 1444).

2. All Words in a Claim Must Be Considered

“To establish *prima facie* obviousness..., “[a]ll words in a claim must be considered””. MPEP 2143.03, quoting *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970); see also, *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974); *In re Wilder*, 429 F.2d 447, 166 USPQ 545, 548 (CCPA 1970); *In re Angstadt*, 537 F.2d 498, 190 USPQ 214, 217 (CCPA 1976); *In re Geerdes*, 491 F.2d 1260, 180 USPQ 789, 791 (CCPA 1974).

3. Next Office Action

If an Office Action fails to set forth sufficient facts to provide a *prima facie* basis for the rejections, any future rejection based on the applied reference will necessarily be factually based on an entirely different portion of that reference, and thus will be legally defined as a “new grounds of rejection.” Consequently, any Office Action containing such rejection can not properly be made final. See, *In re Wiechert*, 152 USPQ 247, 251-52 (CCPA 1967) (defining “new ground of rejection” and requiring that “when a rejection is factually based on an entirely different portion of an existing reference the appellant should be afforded an opportunity to make a showing of unobviousness vis-a-vis such portion of the reference”), and *In re Warner*, 379 F.2d 1011, 154 USPQ 173, 178 (CCPA 1967) (the USPTO “has the initial duty of supplying the factual basis for its rejection”).

B. Analysis

As demonstrated, *supra*, claim 1, from which each of claims 13-18 ultimately depends, states, *inter alia*, yet no substantial evidence has been presented that the applied portions of Engdahl teach, “responsive to a detected collision between a parent node of said hierarchy of said collection and a leaf node of the parent node, automatically **adjusting a position** of said parent node”.

**AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT**

**Application 10/664,754
Attorney Docket 2002P15652US01 (1009-039)**

The applied portions of the other applied references fail to cure at least these deficiencies of the applied portions of Engdahl.

Thus, even if there were proper evidence of obviousness presented in the Office Action (an assumption that is respectfully traversed), and even if there were a reasonable expectation of success in combining or modifying the applied portions of the references relied upon in the Office Action (another assumption that is respectfully traversed), the applied portions of the references relied upon in the Office Action, **as attempted to be modified and/or combined**, still do not expressly or inherently teach every limitation of the independent claims, and consequently fail to establish a *prima facie* case of obviousness. Consequently, for at least the reasons mentioned above, reconsideration and withdrawal of these rejections is respectfully requested.

Applicant respectfully notes that the present Office Action fails to evidence the scope and contents of the prior art as required under *Graham*. The present Office Action fails to even identify what "the pertinent art" is. Moreover, the present Office Action fails to evidence the level of ordinary skill in the pertinent art.

In response to this previously presented and persuasive argument, the present Office Action states, at Page 17:

Applicant is directed to the 'Conclusion' of each Office Action issued in this Application for prior art that has been made of Record, and moreover, to every form PTO-S92 issued in this Application. Applicant will find a total of Thirty-Seven (37) cited references. Each of these references, notwithstanding being relied upon, is considered pertinent to applicant's disclosure. Applicant is required under 37 CFR §1.111(c) to consider these references fully when responding to each Office Action to which an Amendment is made. The scope and content of the prior art, inter alia, has been evidenced, not only by making it of Record, but furthermore, by presenting precise mappings from any applicable disclosure or teaching in the prior art to the applicable claim limitation(s). Applicant is reminded that, 'Factors that may be considered in determining level

**AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT**

Application 10/664,754

Attorney Docket 2002P15652US01 (1009-039)

of ordinary skill in the art include (1) the educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the technology; and (6) educational level of active workers in the field.'

Environmental Designs, Ltd. v. Union Oil Co., 713 F.2d 693, 696, 218 USPQ 365, 863 (Fed. Cir. 1983), cert. denied, 464 U.S. 1043 (1984).

These statements are respectfully traversed. As an initial matter, these statements fail to evidence that one having ordinary skill in the art would consider each of the "Thirty Seven (37) cited references" "pertinent" to the claimed subject matter. In addition, no evidence is presented that the scope and contents of the prior art is limited to the cited references. In addition, merely listing factors to consider in determining the level of ordinary skill in the pertinent art fails to evidence or indicate what the level of skill of one having ordinary skill in the art is. Moreover, since Applicant did not amend any claims for reasons related to patentability, the provisions of 37 C.F.R. 1.111(c) are inapposite. Applicant respectfully submits that the present Reply, as well as the Reply dated 18 July 2007 meet the requirements of 37 C.F.R. 1.111(b).

Applicant respectfully traverses the failure of the present Office Action to comply with the requirements of *Graham* and thereby, to provide a *prima facie* rejection under 35 U.S.C. 103. For at least these reasons, Applicant respectfully requests reconsideration and withdrawal of each rejection of each of claims 13-18.

III. New Claims

Claim 21 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of the relied-upon references teach, a "wherein the arrangement is rendered responsive to a user-specified inter-generational spacing between nodes".

Claim 22 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of the relied-upon references teach, a "wherein the arrangement is rendered responsive to a user-specified intra-generational spacing between nodes".

**AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT**

Application 10/664,754

Attorney Docket 2002P15652US01 (1009-039)

Claim 23 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of the relied-upon references teach, a "wherein the arrangement is rendered responsive to a user-specified node wall thickness".

Claim 24 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of the relied-upon references teach, a "wherein the arrangement is rendered responsive to a predetermined upper and lower limit of inter-generational spacing between nodes".

Claim 25 states, *inter alia*, yet no substantial evidence has been presented that the applied portions of the relied-upon references teach, a "wherein the arrangement is rendered responsive to a predetermined upper and lower limit of intra-generational spacing between nodes".

IV. Discussion Regarding *In re Wiechert*

Regarding Applicant's citation of *In re Wiechert*, the present Office Action asserts, at Page 16:

Applicant has misinterpreted and misapplied *In re Wiechert*. The court held that an appellant should be afforded an opportunity to make a showing of unobviousness when the applicant depends on showing of unexpected properties to support patentability and the factual basis of the obviousness rejection is based on an entirely different portion of an existing reference. The language applicant quoted is missing the important leading language, 'Under such circumstances...' Those circumstances are only when the applicant depends on showing of unexpected properties to support patentability. Applicant has not advanced any showing of unexpected properties heretofore.

Applicant respectfully traverses this assertion as a misapprehension of *In re Wiechert*. The opinion of Judge Rich in *In re Wiechert* stated (emphasis added):

[i]t seems basic to the concept of procedural due process that an applicant at least be informed of the broad statutory basis for rejecting his claims, so that he may determine what the issues are on which he can or should produce evidence.

In the present case, the rejection first advanced by the board left appellant without

**AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT**

Application 10/664,754

Attorney Docket 2002P15652US01 (1009-039)

an opportunity to make a showing of unobviousness. Appellant requests that we provide such an opportunity by remanding the case to the board.

An applicant's attention and response are naturally focused on that portion of the reference which is specifically pointed out by the examiner. More important, where, as here, the appellant depends on a showing of unexpected properties to support patentability, the comparison which results in a conclusion of unexpected properties cannot practically be made for all of the compounds which might be mentioned in a particular reference. Under such circumstances, we conclude that when a rejection is factually based on an entirely different portion of an existing reference the appellant should be afforded an opportunity to make a showing of unobviousness vis-à-vis such portion of the reference.

In re Wiechert, 370 F.2d 927, 933 (C.C.P.A., 1967). This portion of the opinion of *In re Wiechert* does not limit "circumstances" that an "appellant should be afforded an opportunity to make a showing of unobviousness" to "only when the applicant depends on showing of unexpected properties to support patentability". Instead, the discussion regarding the appellant depending on "a showing of unexpected properties to support patentability" is presented as an additional factor justifying remand. Read in its entirety, and contemplated logically, the opinion indicates that if a different portion of a relied-upon reference is applied in rejecting claims, allowing Office Action finality deprives an applicant of procedural due process since no opportunity is provided for the applicant to determine "what the issues are on which he can or should produce evidence". Applicant respectfully traverses the apparent attempt of the present Office Action to improperly limit the holding of *In re Welchert* and potentially deprive Applicant of procedural due process regarding the present application.

V. Unsupported Assertions Regarding References

The present Office Action asserts, at Page 16:

Applicant is directed to the current rule at 37 CFR 104(c)(2), which states, *inter*

**AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT**

Application 10/664,754

Attorney Docket 2002P15652US01 (1009-039)

alia:

In rejecting claims for want of novelty or for obviousness, the examiner must cite the best references at his or her command. When a reference is complex or shows or describes inventions other than that claimed by the applicant, the particular part relied on must be designated as nearly as practicable. The pertinence of each reference, if not apparent, must be clearly explained and each rejected claim specified.

All references relied on by the Examiner are not complex and are directed to applicants invention.

Applicant respectfully traverses this assertion of the present Office Action as lacking any factual basis. The present Office Action presents no evidence that the relied-upon references are "not complex". In addition, no evidence is presented that the relied-upon references do not show or describe inventions other than that claimed by the applicant.

For example, the Abstract of Arora, a reference relied upon by the present Office Action states, "[a] method and apparatus for a structure editor implementing a 'top-down' approach to designing a Web page." By contrast, the claimed subject matter is directed toward "rendering" a "collection" of "HMI screen nodes", which are "a visual representation of a corresponding visual display of a human machine interface adapted to interpret communications from a human operator of an industrial plant to an automated machine controller". No evidence is of record that "[a] method and apparatus for a structure editor implementing a 'top-down' approach to designing a Web page" is not an invention other than that claimed by Applicant.

As another example, the Abstract of Engdahl states, "[a] human/machine interface for designing, monitoring and troubleshooting complex industrial control systems uses the paradigm of the factory floor to organize machines, control program portions and data as virtual spatially linked objects that may be moved in three dimensions to be joined with other spatially linked objects." By contrast, the claimed subject matter is directed toward "rendering" a "collection" of "HMI screen nodes", which are "a visual representation of a corresponding visual display of a

**AMENDMENT UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 2178
PATENT**

Application 10/664,754

Attorney Docket 2002P15652US01 (1009-039)

human machine interface adapted to interpret communications from a human operator of an industrial plant to an automated machine controller". No evidence is of record that, "[a] human/machine interface for designing, monitoring and troubleshooting complex industrial control systems uses the paradigm of the factory floor to organize machines" is not an invention other than that claimed by Applicant.

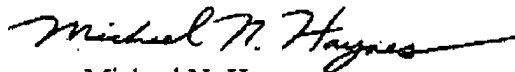
CONCLUSION

It is respectfully submitted that the application is in clear condition for allowance. Reconsideration, withdrawal of all grounds of rejection, and issuance of a Notice of Allowance are earnestly solicited.

The Office is hereby authorized to charge any additional fees or credit any overpayments under 37 C.F.R. 1.16 or 1.17 to Deposit Account 50-2504. The Examiner is invited to contact the undersigned at 434-972-9988 to discuss any matter regarding this application.

Respectfully submitted,

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